

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

26295

FILE: B-211539**DATE:** September 26, 1983**MATTER OF:** Forest Service Request for Advance
Decision**DIGEST:**

1. Payment of a contract balance that is claimed by a payment bond surety, the Department of Labor (DOL) for unpaid wages, and a trustee in bankruptcy may be made in the full amount of the DOL claim with the remaining balance payable to the surety.
2. Payment of a contract balance that is claimed by a payment bond surety, the Forest Service for excess procurement costs, the IRS pursuant to a tax levy, and a trustee in bankruptcy may be made in the full amount of the excess procurement costs with the remaining balance payable to the IRS.

By letter dated April 13, 1983, the Director of Administrative Services, Forest Service, Department of Agriculture, requested a decision of our Office in regard to the disbursement of funds withheld under two contracts between Winters Construction (Winters) and the Forest Service.

Winters was terminated for default under Forest Service contracts Nos. 50-0398-1-7 (Bear Creek) and 50-0356-1-17 (Washington Creek) on August 11, 1982. Thereafter, the Forest Service withheld payments totaling \$23,079.42 and \$6,344.22 under the Bear Creek and Washington Creek contracts, respectively.

During the pendency of this request, we were informed by the attorney for the Bank of Columbia Falls, Columbia Falls, Montana, that the bank has "settled its claim of \$27,000" against Winters arising out of assignment to the bank under these contracts

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and that it has no further interest in the retained funds. There are several other claimants to the funds, however, and we have been requested to determine the priority of these claims.

Bear Creek Claimants

1. Balboa Insurance Company, the surety on the payment bond, claims \$3,336 for payments made under that bond.
2. The Department of Labor (DOL), by letter of February 2, 1983, requested that the Forest Service transfer \$21,580.44 to it for unpaid wages due in violation of the labor standards provisions of the contract.
3. The trustee in bankruptcy, who was appointed after Winters filed a bankruptcy petition on February 18, 1983.

Priority of Bear Creek Claims

As to the priority of claims between a payment bond surety and DOL for the benefit of the unpaid workers, 40 U.S.C. § 276a-2(b) (1976) provides, in pertinent part:

"If the accrued payments withheld under the terms of the contract * * * are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required * * * such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials * * *"

Since laborers have the right to recover unpaid wages from the surety, it follows that the claim of DOL for the benefit of unpaid workers prevails over the surety's claim.

Concerning the claim of the trustee in bankruptcy, it is subordinate to both the claim for unpaid wages (Cascade Reforestation, Inc., 56 Comp. Gen. 501 (1977), 77-1 CPD 250) and the claim of the payment bond surety (see Pearlman v. Reliance Insurance Company, 371 U.S. 132 (1962)).

Accordingly, the claim for unpaid wages in the amount of \$21,580.44 may be paid in full. The remaining balance of \$1,498.98 may be paid to the surety.

Washington Creek Claimants

1. Balboa Insurance Company, the surety on the payment bond, claims \$7,234.47.
2. The Forest Service awarded a contract to complete the project to a third-party contractor on October 4, 1982, for \$53,722.87, resulting in an excess reprocurement cost of \$3,467.97.
3. The Internal Revenue Service (IRS) claims an amount of \$27,515.22 for taxes due on wages paid under the contract. The contracting officer received the tax levy on February 22, 1982.
4. The trustee in bankruptcy.

Priority of Washington Creek Claims

The Forest Service's claim for excess reprocurement costs has priority over both the tax claim of the IRS (Pacific Insurance Company, Limited, B-180333, April 2, 1974, 74-1 CPD 163; B-161460, May 25, 1967) and the claim of the payment bond surety (M.C.&E. Service & Support Co., Inc., B-189137, August 1, 1977, 77-2 CPD 65).

Concerning the priority of the claim for excess reprocurement costs and the claim of the trustee in bankruptcy, the Government's right of setoff prevails. Cf. United States v. Brunner, 282 F.2d 535 (10th Cir. 1960), where the court held that the Government's claim for excess reprocurement costs had priority under the Bankruptcy Act of 1898 over a trustee's claim since the filing of the bankruptcy petition constituted an anticipatory breach of the contract even though the Government's claim was unliquidated as of the date the petition was filed. In contrast to the facts in Brunner, the Forest Service's claim for excess reprocurement costs was liquidated at the time Winters filed its bankruptcy petition. Therefore, the claim for excess reprocurement costs in the amount of \$3,467.97 may be paid in full.

The tax claim also has priority over the claim of a payment bond surety (Robert L. Singleton; Capital City Construction, Inc., et al., B-189183, January 12, 1979, 79-1 CPD 17) and the claim of the trustee in bankruptcy which postdates the tax levy.

Therefore, the remaining balance of \$2,876.25 may be paid to the IRS.

for *Milton J. Fowler*
Comptroller General
of the United States